HASSAN (Migration) [2019] AATA 6523 (9 December 2019)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Khoder HASSAN
VISA APPLICANT:	Miss Amira ABAS
CASE NUMBER:	1826105
DIBP REFERENCE(S):	BCC2018/1214287
MEMBER:	Russell Matheson
DATE:	9 December 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa: • Public Interest Criterion 4020 for the purposes of cl.300.223 of Schedule 2 to the Regulations.

Statement made on 09 December 2019 at 8:26am

CATCHWORDS
MIGRATION – refusal – Prospective Marriage (Temporary) (Class TO) visa – subclass 300– applicant has given false or misleading information–requirements of PIC 4020 waived –a dependent child has been born of the relationship –compelling or compassionate circumstances – decision under review remitted

LEGISLATION
Migration Act 1958, ss 5, 65
Migration Regulations 1994, Schedule 4, cl 300.223

CASES
Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 28 August 2018 to refuse to grant the visa applicant (the applicant) a Prospective Marriage (Temporary) (Class TO) visa under s.65 of the *Migration Act 1958* (the Act).

5. The applicant applied for the visa on 14 March 2018. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.300.223 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate was not satisfied that the applicant met the Public Interest Criterion (PIC) 4020 of Schedule 4 to the Regulations, as the delegate found that the applicant has given information that is false or misleading in a material particular in relation to the visa application. The delegate found that the applicant does not satisfy PIC 4020(1)(a).

6. The Tribunal did not hold a hearing and the matter was granted priority status as per President's direction "Prioritising cases in the Migration and Refugee Division". as per 3.04(b) of this direction, 'continued separation of a child from their parent, guardian or career'.

7. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration.**

8. Background

9. The applicant is a 30-year-old female born in Lebanon. She has declared no previous relationships prior to her current relationship with the review applicant (sponsor).

10. The sponsor is a 33-year-old male born in Lebanon. He first entered Australia in 2010 on a student visa. The sponsor was granted a spouse visa on 10 July 2015. The sponsor was previously married twice prior to his relationship with the applicant. The sponsor provided divorce certificates to support these claims. He has declared no children from his previous relationships. On 2 November 2019 the applicant gave birth to a child from the relationship. The parties provide as evidence a translated copy of the Family Book entry No.18269680/17 indicating that the applicant and sponsor are the parents of the child.

11. The applicant and sponsor met in 2004 while they were still at school. The sponsor asked to marry the applicant in 2010 when he went to Australia but her family did not support this. According to a relationship statement provided with the application, the applicant and sponsor reconnected in 2015 and got married religiously on 9 September 2016. They have provided a Lebanese marriage certificate executed before the government on 1 October 2016. However, the applicant and sponsor also provided a Notice of Intended Marriage dated 18 October 2018, as the sponsor was still legally married to his previous wife at the time of his marriage to the applicant. A consequence of this is that their marriage is not recognised under the *Marriage Act*.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in this review is whether the visa applicant meets PIC 4020 as required by cl.300.223 for the grant of the visa. Broadly speaking, this requires that:

    - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical

officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting three years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

- the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and

- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

13. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

14. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

15. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

16. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

17. The Tribunal is mindful that nothing in the definition of a bogus document or the application of PIC 4020 requires the applicant's knowledge or consent or even involvement in the production or provision of a bogus document. PIC 4020 is enlivened whether or not the bogus document or information was provided by the applicant knowingly or unwittingly. The applicant argues, by reference to *Trivedi*, that there was no intention to purposely deceive and no element of fraud or deception. The Tribunal considers that claim misguided. In the Tribunal's view, *Trivedi* relates to circumstances where there is an honest mistake or a typographical error. In the present case, if the relevant documents are found to be bogus

documents, for example, because they are counterfeit or issued by a person without authority to do so, that in itself implies an element of fraud or deception, whether on the part of the applicant or another person, and such circumstances would not be covered by the reasoning in *Trivedi.* The fact that the visa applicant may have been unaware of the provision of a bogus document does not alter the application of PIC 4020.

18. **Assessment against PIC 4020**

19. There was evidence before the Minister that the applicant provided or caused to be provided false or misleading information or bogus documentation to the Department, in relation to this visa application.

20. On 3 May 2018 when interviewed by the Department the applicant provided evidence to the Department that was considered to be false and misleading. The information relates to the timing of when the sponsor and applicant re-connected with each other.

21. The applicant and sponsor claim that they were not in contact in the years that they were apart and they commenced talking to each other again in October 2015. At interview, the sponsor specified that on 15 October 2015, he reached out to the applicant at 1am as he was feeling alone and sad. The Department searched for the sponsor on Facebook and the sponsor's profile was located. On Facebook, the sponsor notes his relationship status as "married" on 9 September 2016 and "in a relationship" on 16 September 2015. Declaring that he was in a relationship on Facebook in September 2015 contradicts the claims in the application. The applicant states that she "saw on his profile that he was sick", she would ask about him and that they would be in contact on occasions. Furthermore, an open source search for 'Hamdah Industries' the sponsor's company LinkedIn page shows his previous wife, Georgette, as his present secretary. This contradicts his claim that he had limited contact with his ex-wife since the divorce. His previous wife also comments on his new relationship in September 2015.

22. On 14 June 2018 the applicant was emailed a Natural Justice letter inviting her to comment on this information.

23. On 2 July 2018 the Department received a response from the sponsor. In his response the sponsor stated:

    - He reconnected with the applicant, his current wife, in mid-October 2015 and that he enclosed evidence; and

    - He was in contact with another woman in Lebanon but their relationship collapsed before his contact with the applicant.

24. The evidence provided by the sponsor is a short chat log dated from 23 October 2015 to 30 October 2015 to support his claim. The chat log does not clarify who the persons talking are in the chat and consists of a brief conversation; the name of the person in the chat is "habibi", an Arabic common term of endearment. It does not clarify the date the applicant and sponsor met. The delegate considered the information provided in the response and did not accept the argument that the sponsor was speaking to another person during those dates, which was to account for who the sponsor claimed he was 'in a relationship' with on Facebook. Significantly, neither the applicant nor the sponsor has provided their original Facebook conversations to support the timing of their re-connection.

25. Further, the delegate through the information given in the applicant and sponsor's statements found the applicant has caused to provide false and misleading information to the Department in relation to the timing of their re-connection, development of their

relationship and marriage. The applicant and sponsor married prior to the divorce of the sponsor on 9 September 2016. The sponsor was granted permanent residence on 10 July 2015 on the basis that he was in a relationship with his previous wife, Georgette. If he had not been in a relationship at that time, he would not have met the requirements for permanent residence in Australia. The delegate found it likely that the timeline of events has been amended to obscure the true timeline. A possible reason for this is that the applicant and sponsor re-connected prior to the grant of the sponsor's permanent residence.

26. Based on the evidence and information provided the delegate found that the applicant has provided information that is false or misleading in a material particular.

27. Accordingly, the Tribunal has considered the information provided to the Department. The Tribunal is not satisfied that the applicant meets PIC 4020, subclause 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

28. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03 of the regulations), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

29. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.

30. **Compelling or compassionate circumstances**

31. The Tribunal is required to consider all the circumstances of the case, including any matters put forward by an applicant, and determine on the evidence as a whole whether there are compelling and/or compassionate circumstances justifying the granting of the visa.

32. For the following reasons, the Tribunal is satisfied that the requirements should be waived.

33. The Tribunal considered whether there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.

34. Since the lodgement of the partner visa application, the applicant and sponsor have had a child together, born 2 November 2019 in Lebanon.

35. As, such the applicant and sponsor have requested the Tribunal place significant weight on the fact that a dependent child has been born of the relationship.

36. Children of the relationship

37. On 2 November 2019 the applicant gave birth to the couple's daughter in Lebanon. The applicant provided to the Tribunal as evidence a translated copy of the Family Book entry No.18269680/17 indicating that the applicant and sponsor are the parents of the child. The Tribunal accepts that the birth of a child is a significant event, and that it is preferable for the

children to have both parents involved in their care. The Tribunal considers that the birth of a child of the relationship, and a child who is an Australian citizen by birth, along with the pre-natal and post-natal care and support, combined with the positive effect of the emotional, practical and physical support that the sponsor provides to the wellbeing of the applicant and early years of raising the child, benefits the whole family. The Tribunal considers that a loving, stable, responsive relationship is fundamental to the child's development. The Tribunal considers the birth, care and support of a child born to the parties to constitute a compelling or compassionate reason for the waiver. For that reason, the Tribunal is satisfied that there are compelling or compassionate circumstances that affect the interests of Australian citizens.

38. Therefore, the Tribunal uses its discretion in PIC 4020(4) to waive the requirement to meet PIC 4020(1)(a).

39. **Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?**

40. There is nothing before the Tribunal to suggest that the applicant (or a member of her family unit) has been refused a visa because of a failure to satisfy the criteria in PIC 4020(1). Therefore, the applicant meets PIC 4020(2).

41. **Has the applicant satisfied the identity requirements?**

42. PIC 4020(2A) requires an applicant to satisfy the Tribunal as to his or her identity. The applicant's identity documents were provided with the application. No issue with her identity has been raised by the delegate.

43. The Tribunal is satisfied that the applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

44. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).

45. There is no evidence the applicant or any member of her family unit had been refused a visa because of a failure to satisfy the identity requirement.

46. There is no evidence to suggest the applicant does not meet PIC 4020(2B) and therefore the Tribunal is satisfied it is met.

47. **Conclusion**

48. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.300.223.

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DECISION

52. The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa:

    - Public Interest Criterion 4020 for the purposes of cl.300.223 of Schedule 2 to the Regulations.

Russell Matheson
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
(a) the application for the visa; or
(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:
(a) starting 3 years before the application was made; and
(b) ending when the Minister makes a decision to grant or refuse to grant the visa;
the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(2A) The applicant satisfies the Minister as to the applicant's identity.

(2B) The Minister is satisfied that during the period:
(a) starting 10 years before the application was made; and
(b) ending when the Minister makes a decision to grant or refuse to grant the visa;
neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).

(2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
(a) compelling circumstances that affect the interests of Australia; or
(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
justify the granting of the visa.

(5) In this clause:
information that is ***false or misleading in a material particular*** means information that is:
(a) false or misleading at the time it is given; and

(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

…

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

…

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or
(b) is counterfeit or has been altered by a person who does not have authority to do so; or
(c) was obtained because of a false or misleading statement, whether or not made knowingly.

…